APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1895.
March 12.

QUEEN-EMPRESS *v.* LATIFKHÁN.*

Penal Code (Act XLV of 1860), Sec. 330—Using violence for the purpose of extorting a confession—Abetment—Illegal omission to act—"Respondeat superior"—Bombay Police Act (IV of 1890), Secs. 51 and 52—Duty of a police officer to shelter a person in custody.

A policeman who stands by, acquiescing in an assault on a prisoner committed by another policeman for the purpose of extorting a confession, is guilty of abetment of an offence under section 330 of the Indian Penal Code.

Nothing but fear of instant death is a defence for a policeman who tortures any one by order of a superior. The maxim *respondeat superior* has no application in such a case. Under the Bombay Police Act (IV of 1890) every police officer is bound to shelter a person in custody, and to arrest persons committing assaults likely to cause grievous bodily injury. If he omits to perform this duty, he is guilty of abetment.

When the law imposes a duty to act on a person, his illegal omission to act renders him liable to punishment.

APPEAL from the conviction and sentence recorded by A. H. Unwin, Sessions Judge of Násik, in the case of *Queen-Empress v. Chunilál and Latifkhán.*

The accused No. 1 (Chunilál), a police constable, was charged with voluntarily causing hurt to extort a confession, under section 330 of the Indian Penal Code (Act XLV of 1860).

Latifkhán (accused No. 2), who was also a police constable, was charged with abetment of the offence.

The facts of this case were briefly as follows:—

One Chandri reported to the police pátil and to the two constables (the accused in the present case) that her neighbour Mahádu had committed theft of her property during her absence from her house. Mahádu was thereupon arrested and remained in close custody. His house was searched after 11 P.M., but no part of the stolen property was found. Then ashes were spread on the ground, and he was made to walk or stand on them. Accused No. 1 (Chunilál) beat him with his fist and kicked him with his booted foot for the purpose of extorting a confession. But no confession could be

* Criminal Appeal, No. 16 of 1895.

extracted from him. Accused No. 2 (Latifkhán), who was present at the beating, did not remonstrate with accused No. 1, or prevent him from offering violence to Mahádu. Mahádu remained a prisoner on his verandah guarded by accused No. 2. Within a short time after the beating, Mahádu died.

The Civil Surgeon who examined the corpse was of opinion that the immediate cause of death was rupture of the spleen. He attributed the rupture to some external violence, such as blows and kicks, although there were no external marks of injury.

The Sessions Judge, differing from the assessors, found both the accused guilty of the offences charged, and sentenced accused No. 1 to rigorous imprisonment for four years, and accused No. 2 to rigorous imprisonment for two years.

Against these convictions and sentences the accused appealed to the High Court.

Máneckshâh Jehángirsháh for accused.

Ráo Sáheb *Vásudev J. Kirtikar*, Government Pleader, for the Crown.

JARDINE, J.:—Before dealing with the questions of law, I will state the views I take of the facts which in most points are those expressed by this Court in its oral judgment upholding the conviction and sentence passed on Chunilál. I gave great weight to the remarks of the learned Judge on the demeanour of the witnesses; he heard them, and that is one recognized way of estimating them. His estimation is confirmed by several things. 1st, the assessors have nothing to say against Sukráni, whom he believes. 2nd, she has not varied her story in any substantial particular. 3rd, the other witnesses, Chandri and Yesha, after first denying the assault, have sworn to her story in most details. The pátil who denies any assault, is not to be believed. He and Yesha are both police officers and took a part in the improper, and seemingly unreasonable, arrest and search which preceded the death of Mahádu; in screening the prisoners they screen themselves. It is possible, as no marks were found on the skin, that Sukráni has exaggerated the assault: one blow or kick near the spleen might have produced the rupture, but the evidence is that several were given: this also is possible. Every-

1895.

QUEEN-EMPRESS *v.* LATIFKHÁN.

thing shows that there was no circumstance showing a reasonable ground of suspicion that Mahádu was guilty of the theft alleged by Chandri; the whole evidence is that the endeavour of Chunilál was to induce a confession, in lieu of evidence, from Mahádu, and that he denied it. It was not the interest or intention of any one to do serious bodily harm such as would leave marks. Such behaviour is full of risk. It was the intention by threats, and gestures full of threats, such as light blows or kicks, to get the man to confess. This is the evidence.

Section 163 of the Criminal Procedure Code (X of 1882) forbids every policeman whosoever to do such a thing; and no superior is to be obeyed who dares to set himself above the law. Sections 165 and 103 require the police officer to use some publicity in making a search: he must require two or more respectable inhabitants of the locality to be present. This is a certain check on malpractices. It was not observed; and these dark proceedings went on at night. The prisoner Latifkhán was present, and the first question about him is, what did he do? It is admitted that he did not strike the deceased. His presence is consistent with the absence of any *mens rea* as to torture, or extortion of confession. It is easy to depose to words or gestures of a sort to implicate him in this crime. Therefore, the evidence must be carefully and cautiously examined. I attach no great importance to the discrepancy in Sukráni's two statements as to whether the slap she says Latifkhán gave her was before or after the first blow given by Chunilál to Mahádu. I do not regard her as a false witness. The more reluctant witness, Chandri, says Latifkhán waved her off. The other reluctant witness, Yesha, says he waved his right hand at her, saying don't make a row, but whether his hand touched her or not, he did not see. From the mouths of such persons, I treat these statements as unwilling corroboration. The common intention of Chandri, Yesha, the pátil and Chunilál was to induce a confession. The waving off of Sukráni, the telling her not to make a row, seem to me things done by Latifkhán to effect that result. I see nothing improbable in Sukráni's assertion that Latifkhán said "Let us beat them both and then they will confess." The Sessions Judge was in a better position than this Court to say whether she is a truthful witness or not. I take it that she is.

1895.

QUEEN-EMPRESS
v.
LATIFKHÁN.

Taking this view of the facts, I am of opinion that Latifkhán was rightly convicted, and I would sustain the conviction on two grounds: his proved encouragement of Chunilál, his proved omission to perform his legal duty. Under the Bombay Police Act IV of 1890 every police officer is always on duty in his district—section 32, and bound to shelter every person in custody—section 52, and to arrest persons committing assaults like that on Mahádu—section 51. He has not pleaded the order of a superior or coercion by a superior; and there is nothing to show that Chunilál had authority over him, both being ordinary constables, Chunilál being of the first class, but neither of them head constables. Mr. Justice Ránade thinks, however, that the prisoner was under Chunilál's orders. Mahádu was in their joint custody when the kicks and blows were given, which caused rupture of the spleen. After such a horrible occurrence, the remarks of the Sessions Judge on the illegal doings of the men will doubtless receive serious attention.

To prevent such disgraceful malpractices in future, it will be well for the Bench to declare what the law is and on what doctrine founded. The Indian Penal Code (Act XLV of 1860), sections 329, 330 and 331, punishes those who use torture to extort discovery or confession. The following are two of the illustrations to section 330 :—1. A, a police officer, tortures B in order to induce Z to confess that he had committed a crime. A is guilty of an offence under this section. 2. A, a police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section. The punishment may extend to seven years' imprisonment and fine. Both of these illustrations might have been framed from the evidence in the case before us. In such matters, Mr. Mayne in his commentary on section 79 of the Indian Penal Code points out that the command of a superior, whatever his rank, is no defence. Where by command of a jamádár then present some constables tortured a woman, they were held guilty—*Queen* v. *Behary Singh*[1]. No such excuse is a defence at law unless it is definitely accepted by the law itself as a defence; and then it is usually enacted as a general or special exception to the ordinary law. Nothing but fear of instant death is a defence for a policeman who tortures a man or woman by superior order. This interpretation is placed on section 94 of the

(1) 7 W. R., 3 Cr. Rul.

1895.

QUEEN-EMPRESS v. LATIFKHÁN.

Penal Code in *Queen* v. *Sonoo*[1], where the prisoners pleaded that a police inspector had coerced them to make false statements. This case is quoted with approval in the leading case, *Queen-Empress* v. *Maganlál*[2], where the same interpretation is placed on section 94 by Bayley, J., and myself. When the law places a duty to act on a person, his illegal omission to act is to be judged by the same principles. It may be a form of abetment under section 107 ; while section 116 takes particular notice of the omission of a police officer whose duty it is to prevent a crime. So where a police officer purposely kept out of the way, knowing that some persons were likely to be tortured to get confessions out of them, he was pronounced guilty of abetment—*Queen* v. *Kali Churn*[3]. In the present case, the law required Latifkhán to prevent Chunilál using torture, but he did not even expostulate. The law, therefore, punishes his failure to act. Otherwise any single policeman might by overawing the Queen's subjects by surrounding them with a force of acquiescing constables proceed to torture and murder one person after another, the presence of these officers of the law being the means of breaking the law. See Lord Macaulay's note cited at page 132 of *Maganlál's* case[2]. It would, therefore, have been no defence, if pleaded by Latifkhán, that he acted under some sort of obedience to Chunilál. There may be a habit of thought of this kind among the police, a tradition to this effect, a feeling of helplessness diffused among them. These are the excuses made for the corrupt Mámlatdárs by Sir Raymond West, which were considered in *Maganlál's* case (see p. 130), and were pronounced vain before the law. The police no more than the Magistrates will be allowed to plead cowardice: the law by the threat of punishment compels them to act up to their duty and forces each one of them to interpose his authority and prevent the other torturing their prisoner. Here the maxim *respondeat superior* has no application; the only superior is the law. This telling a prisoner that he is guilty and using threats or violence to make him confess, are treated by Lord Coke as malpractices contrary to the great provision of the Great Charter which forbids any judgment or punishment of the subject except by the Courts of law—2 Inst. 54 on Magna Charta, Cap. 29. Even when the words *legem terræ* were held to

(1) 10 W. R., 48 Cr. Rul.

(2) I. L. R., 14 Bom., 115.

(3) 21 W. R., 11 Cr. Rul.

import the prerogative (see David Jardine's Reading on Torture) and to sanction the practice of torture by the King's command, they were never held to sanction it on the part of lower officers. This great provision is at the foundation of our law; and, as an old lawyer says quaintly, Magna Charta is so troublesome a fellow that he will have no superior.

It behoves the District Magistrate to make due inquiry into the behaviour of the police pátil and his reasons for reporting that Mahádu died of fever. He is the officer on whom the law imposes the duty, in cases of violent death, of holding an inquest and finding a verdict. Although he may rightly have left the inquest to the Magistrate called upon specially by section 176 of the Code to make solemn inquiry whenever a person dies in police custody, he had no right to report anything untrue. I say that when a man is killed under torture, even by such an unforeseen thing as rupture of a diseased spleen, especially if the torture is applied by the agents of the law, it is the solemn duty of Her Majesty's servants, to fulfil her Coronation oath, to make such use of our criminal law and procedure as will prevent such offences taking place again. It is not creditable that, on the mere suspicion of the woman Chandri, both village and district policemen should proceed to such violent measures as to arrest Mahádu, keep him in custody for hours, search his house at night, threaten him to make him confess, and then not state the true facts or lay them before the inquest.

Coming to the sentence passed, I think it right to say that in several recent cases where murders have occurred the petty officials have shirked their duty or falsified the evidence, pleading laziness or cowardice or showing corrupt or partial behaviour. It is not to be tolerated that the lowest class of officers shall in these ways interfere with the due detection and punishment of the highest crimes known to the law. I have doubts, however, whether until *Maganlál's* case[1] came before this Court, the frailty, as a defence, of such excuses as cowardice, helplessness and traditional ways of thought was fully understood. It was even urged by the Advocate General in a later case (*Queen-Empress* v. *Chagan*[2]) that the Government of Bombay believed that that much considered judgment had misled the Magistrates. I do not think that was the case, as section 94 of the Penal

(1) I. L. R., 14 Bom., 115. (2) I. L. R., 14 Bom., 331.

1895.

QUEEN-EMPRESS v. LATIFKHA'N.

Code is clear, and no lawyer had ever suggested, until the matter of the Mámlatdárs arose, that *cowardice or corruption* amounted *to* legal necessity unless fear of instant death were proved. I am glad that there is no doubt now on the doctrine of the law: for it is of course the plain duty of every police officer actively to prevent any other from doing such an act as torture, which everyone knows to be criminal, which often causes far more serious injury to the body than the criminal intends, and which is so likely to impair the bond of allegiance between the subject and the Crown.

The view of the facts taken by my learned colleague logically induces him to propose some reduction of the sentence, and though not disposed to interfere with the discretion of the Judge on that ground, I do not think it necessary to burden the time of a third Judge on this point, but concur for reasons to which we both give weight. The chief offender has been brought to justice as a result of the prompt inquiry by the magistracy and police of Násik. The prisoner may not have been fully aware of the law about abetment, where one policeman stands by acquiescing in an assault on a prisoner committed by the other. It may possibly be that there was some foundation for the unusual argument of Mr. Latham in *Chagan's* case that even the Magistrates did not fully understand the law about accomplices.

As the judgments in *Maganlál's* case[1] and *Chagan's* case[2] declare it clearly in regard to corrupt offers of money, so this judgment now delivered will, we hope, remove any doubts that the inferior police may have as to their duty when another policeman assaults a prisoner to induce him to confess. The result will be to deter people from such doings in the future. We, therefore, reduce the sentence to one year of rigorous imprisonment.

RA'NADE, J.:—We have already disposed of the appeal of accused No. 1, Chunilál. The case as against Latifkhán, accused No. 2, was reserved for fuller consideration. He was charged with having been present at and abetted the torture, under sections 330 and 114 of the Code. It is admitted that accused No. 1 was a police constable, first class, and Latif was a constable, second class. The committing Magistrate had charged both accused with offences under sections 331 and 304, but they were actually tried in the Sessions Court, the first accused under section 330, and the second as abetting under sec-

(1) I. L. R., 14 Bom., 115. (2) I. L. R., 14 Bom., 331.

tion 114, the offence committed by accused No. 1. The committing Magistrate in his statement of the reasons for committal observed that No. 2 accused was not only in company with No. 1 accused when he assaulted the deceased Mahádu, but that, by giving a slap on the face of the prosecutrix, he prevented her from interfering with accused No. 1 when he committed the assault on the deceased. The Sessions Judge, differing from the assessors, found it proved that accused No. 2 was not only present when No. 1 accused kicked the deceased Mahádu, but that he suggested the idea that both the prosecutrix and the deceased should be beaten to make them confess, and that accused No. 2 struck the prosecutrix, not with a view to make her speak, but to prevent her from interposing for Mahádu's protection. I have accordingly to consider how far this story that No. 2 accused actively encouraged No. 1 in the fatal assault, and that he himself co-operated in it by slapping the prosecutrix on her face, is supported by the evidence.

In the case of No. 1 accused, the testimony of the prosecutrix Sukráni was corroborated by the evidence of Chandri and Yesha, who, though they had denied the alleged beating before the police and the Mámlatdár, stated in the Sessions Court that accused No. 1 gave blows with the fist, and two or three kicks with his boot. This agreement between the evidence of the three prosecution witnesses evidently influenced the Sessions Judge in coming to the conclusion he did as regards the guilt of No. 1 accused. In regard to No. 2 accused, however, there is not only no such agreement, but a positive contradiction between the evidence of Sukráni and that of Chandri and Yesha. Chandri stated that accused No. 2 did not strike Sukráni. He warned her off with his hand to lie down at a little distance and that he did not touch her person. Chandri also did not state that accused No. 2 used any words suggesting that both Mahádu and the prosecutrix should be beaten to make them confess. Yesha also stated that accused No. 2 waved his hand, saying to Sukráni "do not make a row," and Yesha did not see if this hand touched Sukráni or not. He also did not state that accused No. 2 suggested that both should be beaten. When both Chandri and Yesha made these statements, they were not under any fear of the accused. They had apparently under fear at first denied all knowledge of the beating and kicking charged to No. 1 accused, but before the Sessions Court

1895.

QUEEN-EMPRESS
v.
LATIFKHA'N.

there was no such fear. There was, if possible, the strongest motive to exaggerate the offence, and it cannot easily be conceived why, when they gave evidence so freely against No. 1 accused, they should have contradicted Sukráni as regards both the statement and the act which Sukráni attributes to accused No. 2. This contradiction between Sukráni's statement and the evidence of Chandri and Yesha materially diminishes the credibility of Sukráni's allegations against No. 2 accused. The Sessions Judge appears to have formed a favourable impression of Sukráni's honesty, but he does not notice the fact that, in so far as accused No. 2 is concerned, not only is she contradicted by Chandri and Yesha, but the story told by her to the Mámlatdár is in flat contradiction to her statements in the Sessions Court. Before the Mámlatdár she stated that "First the Musalmán constable slapped me on the cheek." Thereupon Mahádu remonstrated, and "afterwards the sepoys began to beat Mahádu." Her story in the Sessions Court was that the slap on her face was the last act of assault, and that it was resorted to after Mahádu had been beaten, chiefly to make her remain silent. Sukráni was unable to explain away this contradiction. It is plain, therefore, that this whole story of accused No. 2 having beaten Sukráni to make her remain silent was an afterthought, and had no foundation in fact.

This examination of the evidence leaves no room for doubt that the two particular allegations made against accused No. 2 to prove that he abetted No. 1 accused cannot be accepted as proved by any consistent or reliable testimony. There still remains the fact that No. 2 accused was in the company of No. 1 accused when the latter committed the assault. Mere presence at the commission of an offence cannot be construed as instigation or abetment unless such presence was intended or calculated to have that effect. Thus it was held that while the priest who officiates at a bigamous marriage abets the offence, strangers casually present at the celebration are not abettors of the same. No. 2 accused was no doubt a subordinate of No. 1 accused, but his presence on the occasion, if not intended, was certainly calculated to give countenance to the offence committed by accused No. 1. He cannot plead coercion, for this excuse is only good under section 94, Indian Penal Code—*Empress* v. *Sonoo*[1];

(1) 10 W. R., 48 C. Rul.

Queen-Empress v. *Maganlál*(1)—when the fear is of instant death. In less serious cases, this circumstance can only be pleaded in mitigation of the punishment. The Sessions Judge would certainly not have sentenced the accused No. 2 to two years' rigorous imprisonment but for his conviction that No. 2 accused actively supported No. 1 accused, and that he took part himself in the torture. Even though I hold that the evidence does not support this view, yet as he was a police officer on duty at the time, and as he joined with No. 1 accused in the illegal search at night without the usual precautions of a panch to watch the proceedings, the accused No. 2 by his silent acquiescence was an accessory to the offence of his principal. In the view I have taken of the facts I think a sentence of one year's imprisonment would be sufficiently deterrent punishment under the peculiar circumstances of the case.

(1) I. L. R., 14 Bom., 115.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

1895. *March* 12.

CHARLES AGNEW TURNER, OFFICIAL ASSIGNEE AND ASSIGNEE OF THE ESTATE AND EFFECTS OF A. G. ALMOND, AN INSOLVENT (APPLICANT), *v.* PESTONJI FARDUNJI AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

Insolvency—Attachment before judgment—Insolvency of defendant whose property has been attached before judgment—Right of Official Assignee to attached property—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), *Secs.* 278, 281, 487, 551—*Indian Insolvent Act (Stat.* 11 *and* 12 *Vic., C.* 21).

Plaintiffs filed a suit in a Subordinate Court and attached before judgment some moveable property of the defendant. Before the hearing of the suit, the defendant filed a petition in Bombay under the Insolvency Act, and a vesting order was made.

Held, that the Official Assignee was entitled by an application to the Court, in which the suit was filed, to have the attachment raised before the defendant was declared an insolvent.

Where a vesting order is made after attachment, and before decree, the tilte of the Official Assignee takes effect, and prevents the attaching creditor from obtaining satisfaction of his decree by a sale. In such a case the Official Asssignee can move by an ordinary motion instead of a regular suit.

* Application No. 235 of 1894 under extraordinary jurisdiction.